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No. 85-109

In the Supreme Court of the United States

OCTOBER TERM, 1985

KATHRYN DEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court failed to make sufficiently detailed voir dire inquiries concerning prospective jurors' attitudes about race, welfare benefits, and the testimony of law enforcement officers.

2. Whether the district court erred in admitting evidence of petitioner's involvement in similar crimes.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1985. The petition for a writ of certiorari was filed on July 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of theft of government property, in violation of 18 U.S.C. 641. She was sentenced to two years' imprisonment and a $10,000 fine. She was also ordered to pay $7000 in restitution. The court of appeals affirmed (Pet. App. 1-13).

1. The evidence at trial, summarized in the opinion of the court of appeals (Pet. App. 2-3), established that between June 1982 and September 1983 petitioner received and cashed 24 federal welfare checks that were fraudulently issued by Willette Hutcherson, a county welfare agency employee (*id.* at 2). The checks, issued under the Aid to Families with Dependant Children (AFDC) program, totaled almost $15,000. Petitioner asserted, as her sole defense, that she had received a call from an unidentified person at the welfare office who told her that she was entitled to the checks as retroactive benefits under a previously denied welfare application (*id.* at 2; Tr. 338-340). However, petitioner had no children, had not applied for AFDC benefits, and returned one-third of the proceeds from each check to Hutcherson (*id.* at 2-3; Tr. 100, 330, 399-400).

2. Prior to trial, petitioner submitted 176 proposed voir dire questions (Pet. App. 3). Approximately 30 of the questions addressed the prospective jurors' attitudes toward blacks. Other questions addressed their attitudes toward the offense charged and the credence they would give to the testimony of law enforcement officers. The district judge denied petitioner's specific requests, but asked questions on some of the issues raised by petitioner's proposed questions. Among his questions, he asked whether the prospective jurors had observed "anything whatever about the defendant, which in any way, however subtly, might prejudice [them]" (*id.* at 6; Tr. 42). He also asked whether there was "anything in the nature of the offense charged" that affected their impartiality (see *id.* at 8; Tr. 43).

During the trial, the district judge admitted evidence, over petitioner's objection, that petitioner had filed false claims for prescription drugs (Pet. App. 9). He also admitted testimony, over petitioner's objection, that petitioner's

activities were part of a much larger welfare fraud scheme (*id.* at 11).

3. The court of appeals, applying an abuse of discretion standard, held that the district judge conducted an adequate voir dire (Pet App. 4-9). Relying on *Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981), it first concluded that the judge was not obligated to conduct special questioning concerning racial prejudice (Pet. App. 5). The court observed that this case involved neither special circumstances nor reasonable possibility of racial prejudice (*ibid.*). It suggested that the "better practice" might be to conduct special questioning when the defendant is a member of a racial minority (*id.* at 6), but held that the failure to do so did not constitute reversible error (*ibid.*). The court also noted that the district judge had asked, in general terms, whether the jurors were in any way prejudiced against petitioner (*ibid.*).

The court of appeals next suggested that the district judge should have honored petitioner's request for special questioning concerning potential bias in favor of law enforcement testimony, but it concluded that the failure to do so in this case did not constitute reversible error (Pet. App. 8). The court noted that only one law enforcement officer testified, his credibility was not disputed, and his testimony did not conflict with petitioner's testimony (*ibid.*). It further ruled that the district court's inquiry into juror prejudice concerning the "offense charged" eliminated any need to honor petitioner's specific requests for voir dire on juror attitudes toward welfare fraud (*id.* at 9).

Turning to the evidentiary challenges, the court concluded that the district judge did not abuse his discretion in admitting evidence indicating that petitioner had filed false prescription drug claims with her former employer (Pet. App. 9-11). The court observed that the probative value of the evidence was not substantially outweighed by its

prejudicial effect (*id.* at 10-11). The court likewise affirmed the district judge's admission of testimony indicating that petitioner's activities were part of a larger welfare fraud scheme (*id.* at 11-13).

ARGUMENT

Petitioner contends (Pet. 9-23) that the trial court erred in failing to make a more detailed inquiry into juror attitudes about race, welfare benefits, and the weight to be given testimony of law enforcement officers. She also renews her challenges to the admission of evidence indicating petitioner's involvement in other wrongful activity. These arguments were properly rejected by the court of appeals.

1. "Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*." *Rosales-Lopez* v. *United States*, 451 U.S. 182, 189 (1981) (plurality opinion); see *Ham* v. *South Carolina*, 409 U.S. 524, 528 (1973); *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931). The court may conduct the voir dire itself or allow the parties to conduct it. Fed. R. Crim. P. 24(a). In all events, it has " 'a broad discretion as to the questions to be asked.' " *Rosales-Lopez*, 451 U.S. at 189 (quoting *Aldridge*, 283 U.S. at 310). Absent a showing of particularized need for a special line of questioning, there is no abuse of discretion in refusing to ask specific questions during the voir dire examination, even though the questioning might theoretically aid the defendant in exercising peremptory challenges. See, *e.g.*, *United States* v. *Toomey*, 764 F.2d 678, 682 (9th Cir. 1985) (the trial court did not abuse its discretion in refusing to inquire as to jurors' attitudes toward narcotics); *United States* v. *Jones*, 722 F.2d 528, 529-530 (9th Cir. 1983) (absent a showing of a reasonable possibility of prejudice, the trial court did not abuse its discretion in refusing to

inquire whether jurors were biased against defense of coercion).

a. These general principles apply in the case of voir dire requests directed toward racial or ethnic bias. In *Rosales-Lopez*, a majority of the Court agreed that there is a constitutional obligation to make specific inquiries concerning racial bias only when racial issues are " 'inextricably bound up with the conduct of the trial,' " 451 U.S. at 189 (quoting *Ristaino* v. *Ross*, 424 U.S. 589, 597 (1976)); see 451 U.S. at 194-195 (Rehnquist, J., concurring in the result).[1] Petitioner failed to show that racial issues are present in the instant case. Significantly, this case involves theft of government property rather than an interracial crime. As the court of appeals observed (Pet. App. 5), this case, like *Rosales-Lopez*, simply involves government prosecution of a minority defendant and raises no "special circumstances" or reasonable possibility of racial prejudice. Contrary to petitioner's contention (Pet. 13), there is no reason to assume that a jury will be influenced by racial prejudice simply because a black defendant is tried for welfare fraud. Moreover, the district judge addressed the possibility of racial prejudice by asking the veniremen if they observed

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[1]In *Rosalez-Lopez*, a defendant of Mexican descent was charged with smuggling aliens into the United States. He contended that the trial court committed reversible error in denying his request for a voir dire examination of prospective jurors about racial or ethnic prejudice. This Court rejected the contention, indicating that the federal courts must make such an inquiry where "the external circumstances of the case indicate a reasonable possibility that racial or ethnic prejudice will influence the jury's evaluation of the evidence." 451 U.S. at 192-193 (White, J.). Because the defendant in *Rosales-Lopez* failed to demonstrate special circumstances and the trial court eliminated the possibility of undisclosed racial prejudice through its other inquiries, this Court held that the trial court did not abuse its discretion in refusing to make the requested inquiries concerning ethnic bias. 451 U.S. at 194; *id.* at 194-195 (Rehnquist, J., concurring in the result).

anything about petitioner "which in any way, however subtly, might prejudice" them against her. See Pet. App. 5-6.

b. The district judge also acted within his discretion in refusing to inquire into the prospective jurors' possible bias respecting testimony from law enforcement officers. As petitioner herself acknowledges (Pet. 19-20), the need for such an inquiry depends upon the facts of each case. The failure to conduct such an inquiry cannot constitute reversible error where, as here, there was no dispute concerning the credibility of the single law enforcement officer who testified. See, *e.g.*, *United States* v. *Vadino*, 680 F.2d 1329, 1336-1337 (11th Cir. 1982); *United States* v. *Spaar*, 748 F.2d 1249, 1253-1254 (8th Cir. 1984); see also *United States* v. *Baldwin*, 607 F.2d 1295, 1298 (9th Cir. 1979). Indeed, as the court of appeals noted (Pet. App. 8), the officer's testimony did not significantly conflict with petitioner's testimony.

c. Likewise, the district court acted within its discretion in refusing to ask petitioner's requested questions concerning the prospective jurors' attitudes toward welfare fraud. Even assuming that a trial court should inquire into juror attitudes toward the crimes charged, the district judge substantially fulfilled petitioner's request by asking "whether there was 'anything in the nature of the offense charged' " that might prejudice the jurors against petitioners (Pet. App. 8-9). See *Aldridge*, 283 U.S. at 310 (recognizing the trial judge's "broad discretion as to the questions to be asked"); *United States* v. *Toomey*, 764 F.2d at 682.

2. Petitioner also contends (Pet. 24-27) that the district court erred in admitting evidence of petitioner's other wrongful conduct and evidence indicating that her illegal activities were part of a larger welfare fraud scheme. These claims are insubstantial.

a. The government offered testimony from Mikela Turner-Stroud, petitioner's fellow employee at Blue Cross Insurance Company (Pet. App. 9-10; Tr. 207). The witness testified, among other matters, that petitioner had admitted submitting false drug prescription claims to Blue Cross during the time that she was cashing AFDC checks (Tr. 266-268).

The district judge did not abuse his discretion in permitting this testimony. Evidence of prior wrongful conduct is admissible to prove motive, knowledge, or intent (Fed. R. Evid. 404(b)), although the evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice (Fed. R. Evid. 403). That determination rests within the discretion of the district court. See, *e.g.*, *United States* v. *Jardina*, 747 F.2d 945, 952 (5th Cir., 1984), cert. denied, No. 84-6232 (Mar. 18, 1985); *United States* v. *Gustafson*, 728 F.2d 1078, 1082-1084 (8th Cir. 1984), cert. denied, No. 83-1931 (Nov. 5, 1984); *United States* v. *Bailleaux*, 685 F.2d 1105, 1110-1112 (9th Cir. 1982).

Petitioner claimed, as her sole defense, that she did not intentionally engage in welfare fraud because she thought that the AFDC checks were properly issued to her. Turner-Stroud's testimony, demonstrating petitioner's similar fraudulent activities contemporaneous with the welfare fraud, was thus relevant to prove intent. The court could reasonably conclude that its probative value outweighed the possibility of unfair prejudice.[2] Furthermore, the district judge

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[2]The Ninth Circuit has suggested that such evidence, at least when involving crimes, should be "clear and convincing." See *United States* v. *Bailleaux*, 685 F.2d 1105, 1109-1110 (9th Cir. 1982). The court of appeals, citing *Bailleaux*, agreed with the district court that the evidence was admissible (Pet. App. 10-11). The evidence, a specific admission from petitioner to a fellow employee, had clear and convincing probative value. Notably, other courts do not require evidence admitted

did not err in failing to give a cautionary instruction concerning Turner-Stroud's testimony since none was requested (Pet. App. 11).

b. Petitioner also challenges (Pet. 26-27) the court's admission of testimony from FBI Agent Jason Moulton indicating that petitioner's activities were part of a large-scale welfare fraud scheme. See Pet. App. 11-13; Tr. 289. That brief discussion of the larger scheme was necessary to explain the government's grant of prosecutorial immunity to Turner-Stroud. The judge gave a cautionary instruction explaining the purpose of the testimony (Pet. App. 12-13). The instruction is presumed effective to remedy any potential prejudice. See, *e.g.*, *United States* v. *Johnson*, 618 F.2d 60, 62 (9th Cir. 1980). Thus, the court of appeals correctly rejected petitioner's contention of reversible error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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under Rule 404(b) to meet a "clear and convincing" probity standard. See *United States* v. *Jardina*, 747 F.2d at 952; *United States* v. *Beechum*, 582 F.2d 898, 913 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979); but see *United States* v. *Gustafson*, 728 F.2d at 1083.